

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

DTL, INC.,

Respondent.

**Docket No. FMCSA-2007-28178¹
(Eastern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. Background

On March 13, 2007, the Federal Motor Carrier Safety Administration (FMCSA) New York Division Administrator served a Notice of Claim (NOC) on DTL, Inc. (Respondent). The NOC, based on a February 20, 2007, compliance review, charged Respondent with four violations of the Federal Motor Carrier Safety Regulations: (1) one violation of 49 CFR 382.215, using a driver known to have tested positive for a controlled substance; (2) two violations of 49 CFR 395.8(e), false reports of records of duty status; and (3) one violation of 49 CFR 396.3(a)(1), failing to inspect and maintain a vehicle to ensure safe and proper operating condition. The NOC proposed a civil penalty of \$14,690 for the violations.²

After Respondent failed to respond to the NOC, the Field Administrator for FMCSA's Eastern Service Center (Claimant) served a Notice of Default and Final

¹ The prior case number was NY-2006-0222-US0786.

² Exhibit 2 to Field Administrator's Response and Opposition to Petition for Reconsideration (Claimant's Response).

Agency Order (NDFAO) on April 18, 2007.³ The NDFAO advised Respondent that the NOC would become the Final Agency Order in this proceeding effective April 23, 2007, with the civil penalty immediately due and payable on that date.

On April 24, 2007, Respondent served a Petition for Reconsideration.

Respondent attached to the petition a letter it sent to Claimant on March 5, 2007, setting forth specific corrective actions taken to address the violations identified in the February 2007, compliance review underlying the NOC. Respondent stated that it did not realize that any further correspondence was necessary after it received the March 13, 2007, NOC and requested that the proceeding be reopened to consider reducing the civil penalties based on the corrective actions taken.

In his Response to the Petition for Reconsideration served May 21, 2007, Claimant requested that the petition be denied because: (1) Respondent's March 5, 2007, letter, which preceded the NOC by 8 days, was not a proper reply to the NOC; and (2) the Petition for Reconsideration set forth no arguments supporting a meritorious defense, excusable neglect or due diligence in seeking relief in accordance with 49 CFR 386.64.

2. Decision

Respondent defaulted because it did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a). The March 5, 2007, letter cannot be considered a reply to the NOC because it was mailed 8 days before the NOC was served, addressed the findings of the compliance review rather than the specific violations alleged in the NOC and otherwise did not contain the elements of a proper reply, as set forth in 49 CFR 386.14(b). Under 49 CFR 386.64(b), a Notice of Default

³ Exhibit 3 to Claimant's Response.

and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Respondent can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Respondent has failed to meet its burden of demonstrating that the Final Agency Order should be vacated. Respondent's claim that it believed no further correspondence was necessary following its March 5, 2007, letter to the Field Administrator indicates that it did not carefully read the NOC, which provided detailed directions regarding how to reply and stated, in capital letters: "FAILURE TO REPLY TO THE NOTICE OF CLAIM IN THE EXACT MANNER SPECIFIED IN 49 CFR § 386.14 MAY BE TREATED AS IF NO REPLY HAS BEEN FILED. UNDER 49 CFR § 386.14(c), A FAILURE TO REPLY MAY CAUSE THE FMCSA TO ISSUE A NOTICE OF DEFAULT AND FINAL AGENCY ORDER THIRTY (30) DAYS AFTER THIS NOTICE OF CLAIM IS SERVED." (Emphasis in original).⁴ The above language, as well as additional language in the same paragraph of the NOC not quoted here, clearly explained the consequences of not replying to the NOC. Had Respondent read this language, it presumably would have realized that additional correspondence was indeed necessary in order to avoid a default. Under the circumstances, there is no basis for concluding Respondent's neglect was excusable. Moreover, Respondent did not present a meritorious defense to the violations alleged in the NOC because it admitted the violations.

⁴ NOC, at 6.

Prior to revision of the Agency's rules of practice, effective November 14, 2005, the Agency held that if the motor carrier fails to reply to a Notice of Claim in a timely fashion and thereby defaults, it may not petition separately for reconsideration of the civil penalty amount.⁵ Although the revised rules provide the Assistant Administrator with the discretion to vacate defaults under the excusable neglect, meritorious defense and due diligence standards set forth in 49 CFR 386.64(b), they were not intended to change the pre-existing prohibition against petitioning separately for reconsideration of the civil penalty amount in the event of a carrier default. In discussing § 386.64(b) in the preamble to the revised rules of practice, the Agency indicated that it wanted to limit the grounds for vacating defaults to "relieve the parties, as well as the decisionmaker, of the burden of addressing other issues in these petitions for reconsideration."⁶

We construe the term "meritorious defense" in § 386.64(b) as not applying to requests to reduce a proposed civil penalty where the respondent does not contest the substantive violations. In such cases, the respondent is admitting that it committed the violations and has no meritorious defenses. Requesting a waiver or reduction in the proposed civil penalty under these circumstances raises precisely the type of issue the rules were intended to exclude from consideration in a petition for reconsideration challenging a Final Agency Order pursuant to § 386.64(b). To the extent this conclusion is inconsistent with the discussion of challenges to civil penalties in *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on

⁵ *In the Matter of Kent Ness dba Ness Harvesting*, Docket Nos. FMCSA-2000-8111 and FMCSA-2002-11610, Order Denying Petitions For Reconsideration, March 15, 2002, at 3.

⁶ 70 FR 28477 (May 18, 2005).

Reconsideration (October 8, 2008), that aspect of the *Wells & Wells* decision is overruled.⁷

Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if Respondent acts with due diligence in seeking relief. Although Respondent arguably acted with due diligence by filing his Petition for Reconsideration within a few days after receiving the NDFAO, it would be an empty exercise or futile gesture to vacate the Final Agency Order if he is unable to demonstrate a meritorious defense.⁸

Therefore, the default stands and the Notice of Claim, including the proposed civil penalty assessment, is final. The essence of a default is a failure on the part of the motor carrier or driver to participate in the proceedings when required to do so.⁹ Having failed to participate in these proceedings within the time limit set by law, it is too late for Respondent to now be heard.¹⁰

Nevertheless, we would be remiss were we not to point out that Respondent presented Claimant with evidence of corrective action before issuance of the NOC. It is unclear whether Claimant took this into account in calculating the civil penalty proposed

⁷ In *Wells & Wells*, the respondent did not submit a meritorious defense to the charges in the NOC, but alleged that payment of the proposed civil penalty would put it out of business. It was concluded that this allegation satisfied the meritorious defense prong with regard to the payment of the civil penalty.

⁸ See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration (October 8, 2008), at 5.

⁹ *In the Matter of Parcel Shipper's Express, Inc.*, Docket No. FMCSA-2000-9523, Order, May 25, 2001, at 3.

¹⁰ *In the Matter of Kent Ness dba Ness Harvesting*, *supra*.

in the NOC.¹¹ Had Respondent requested review of the civil penalty with a timely reply, we likely would have reduced the proposed amount.¹² Because Respondent did not participate in these proceedings when it was required to do so, however, we are unable to make any changes to the amount. Accordingly, we leave to Claimant's discretion whether he will demand payment of the full \$14,690 civil penalty, which he is legally entitled to do, or will re-calculate the penalty to take into account corrective action taken by Respondent prior to issuance of the NOC, if he has not already done so.

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding.¹³

It Is So Ordered.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

5-5-09
Date

¹¹ Under 49 U.S.C. § 521(b)(2)(D), in assessing a civil penalty for violations of the Federal Motor Carrier Safety Regulations, the Agency must consider the nature, circumstances, extent and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, effect on ability to continue to do business, and such other factors as justice and public safety may require.

¹² A reduction in civil penalty may be considered if, immediately following the compliance review, the carrier takes action to correct the violations prior to issuance of the NOC. See *In the Matter of Environmental Tree and Design, Inc., d.b.a. Environmental Design Tree Services*, Docket No. FMCSA-2003-14410 (Final Order, December 23, 2004).

¹³ The April 18, 2007, NDFAO stated that the \$14,690 civil penalty was due and payable on April 23, 2007, the date that the NOC would become the Final Agency Order. Because Respondent did not petition for reconsideration until after April 23, 2007, the clock on the effective date of the Final Agency Order was not stayed by the petition. Therefore, the civil penalty is due and payable immediately. Respondent should consult the NDFAO for payment instructions.

CERTIFICATE OF SERVICE

This is to certify that on this 6th day of May, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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